

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AWRAHA YOUKANA DANIEL,

Defendant-Appellant.

UNPUBLISHED

March 4, 2008

No. 276430

Wayne Circuit Court

LC No. 06-010946-01

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

MEMORANDUM.

Defendant appeals as of right his bench-trial conviction of felonious assault, MCL 750.82. We affirm. This appeal is being decided without oral argument. MCR 7.214(E).

Defendant argues that his constitutional right to confront the witnesses against him was violated when the trial court failed to compel the attendance of two police officers, both of whom had been endorsed as prosecution witnesses. On the day of trial, the prosecutor explained that subpoenas had been delivered requesting the officers' presence, but that the two officers had never "signed for" the subpoenas. The prosecution commented that the officers' testimony would have been merely cumulative. The trial court stated that it would draw an adverse inference because the defense demanded the presence of the two witnesses.

Had there been a jury trial in this case, an adverse inference instruction would likely have been warranted. See *People v Perez*, 469 Mich 415, 420-421; 670 NW2d 655 (2003). However, as an obvious matter, no adverse inference jury instruction was given because there was no jury. Moreover, the record establishes that the trial court was well aware of the inference to be drawn from the absence of the two prosecution witnesses. Lastly, defendant had no constitutional right to confront the absent police witnesses because they did not appear at trial and their statements were not admitted into evidence. Thus, the officers were not "witnesses against" defendant. We perceive no Confrontation Clause error in this case. See, e.g., *People v Wilkens*, 267 Mich App 728, 744; 705 NW2d 728 (2005).

We note that, at some point, defendant suggested that the complainant had shot at him. In closing argument, defense counsel indicated that he would have questioned the missing officers to establish that their search for a gun in the complainant's possession was not thorough. However, the trial court concluded that the nature of the officers' search for a gun was irrelevant because there was no claim of self-defense in this case and because there was no credible

evidence of record to suggest that the complainant had ever shot at defendant. Accordingly, even if defense counsel had been able to establish that the officers' search for a gun in the complainant's possession was shoddy or incomplete, this would have had little or no effect on the determination of defendant's guilt. Moreover, defendant has failed to explain why he was unable to call the officers as his own witnesses. *Id.*

Affirmed.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Alton T. Davis